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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ADAN ALCAREZ CEJA, Defendant and Appellant.	B206400 (Los Angeles County Super. Ct. No. BA314942)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary Strobel, Judge. Affirmed.

James H. Barnes for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Daniel C. Chang and Marc Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Adan Alcarez Ceja appeals from the judgment entered following a jury trial in which he was convicted of attempted murder with premeditation and deliberation, with great bodily injury and firearm-use findings. Defendant makes numerous contentions, including instructional error, insufficiency of the evidence, prosecutorial misconduct, and ineffective assistance of counsel. We find no prejudicial error and affirm.

BACKGROUND

Pablo Ponce testified that defendant and another man approached him inside the car wash he managed about 9:45 p.m. on January 2, 2007. The business was closed, and Ponce was preparing to lock up and leave. He had moved his truck to the street and closed, but not locked, the gate. Ponce recognized defendant, who had visited the car wash two days earlier to buy perfume. He recognized defendant's companion as a repeat customer of the car wash.

Ponce testified that defendant pointed a gun at Ponce's forehead, grabbed Ponce with his free hand, and demanded the key to Ponce's truck. Ponce said, "You are not going to do anything to me because there are cameras in here." He broke away from defendant and ran. Defendant chased Ponce and shot at him. The first shot grazed the back of Ponce's neck. The second shot hit Ponce in the upper back. Defendant knocked Ponce to the ground, where he lay face down. Defendant stood next to Ponce and fired two shots in rapid succession. Both shots struck Ponce's arms, which he was using to shield his head. Defendant ran away. His companion had already fled. Neither assailant searched Ponce's pockets or took his truck keys from his pocket. Ponce denied that he ever touched or threatened defendant.

Ponce testified he could not move, so he screamed for help. Two police officers who were patrolling nearby heard the shots and screams and responded immediately. Both of the officers testified that they heard one shot, followed a few seconds later by three shots in rapid succession. Ponce described the man who shot him and gave the officers the telephone number of someone who called him earlier about buying perfume.

Ponce told the officers he had informed the caller he was still at the car wash, but he seemed reluctant to tell the officers the details of the conversation. The officers broadcast the description of the gunman, and a few minutes later Officer Brett De Oliveira detained defendant about three blocks from the car wash. De Oliveira testified that defendant did not appear to be intoxicated. Defendant was cooperative, was not walking "funny," and did not have slurred speech or red, watery eyes.

Police officers later found a revolver in bushes at a house behind or across the street from the car wash. The gun contained four spent casings and one live round. Defendant admitted the gun was his.

The prosecution introduced the car wash's surveillance camera video footage of defendant visiting the car wash on December 31, 2006, and chasing and shooting Ponce on January 2, 2007. (All further date references pertain to 2007 unless otherwise specified.) Defendant admitted in his testimony that the video depicted him. The phone number Ponce recounted to the police was for defendant's mobile phone.

Ponce was hospitalized two days for treatment of his gunshot injuries. At the time of trial, a bullet remain lodged in Ponce's back and caused him pain.

Defendant testified that he first went to the car wash and met Ponce on December 31, 2006. Defendant wanted to give his mother perfume for her birthday, and Ponce offered to allow defendant to take the perfume and pay later. Defendant took Ponce's business card but not the perfume.

On direct examination, defendant testified that he began drinking alcohol around 11:00 a.m. on January 2, and consumed 10 to 15 beers and two bottles of vodka by the afternoon. On cross-examination, defendant testified that he consumed a total of 12 beers and shared a nearly full "regular bottle" of vodka with his neighbor, Mondo. Defendant testified he ate nothing that day. He characterized himself as addicted to alcohol and admitted he could not control his anger when he drank.

Defendant testified that sometime on January 2, either he or Mondo telephoned Ponce about the perfume. Ponce was busy but said he would phone back later. Ponce

phoned defendant around 7:00 or 8:00 and then again around 8:00 or 9:00 p.m. Call records for defendant's mobile phone reflected one call from Ponce about 6:00 p.m. on January 2. On direct examination, defendant testified that Ponce drove to defendant's apartment building to pick up defendant and Mondo to take them to the car wash. After Ponce arrived, he told them to walk to the car wash because his truck was full of boxes and had no room for passengers. On cross-examination, defendant testified that Ponce drove over to defendant's apartment building to "hang out" with defendant, but defendant insisted they go elsewhere. Defendant attempted to get into Ponce's truck, but Ponce said there was no room for passengers. Ponce offered to unpack the truck at the car wash and return for defendant and Mondo, but defendant said they would just walk to the car wash.

Defendant testified he retrieved his gun from his car and put it in his jacket pocket before he and Mondo walked the five blocks to the car wash. Defendant explained that the area was dangerous and he had suffered prior harassment. He denied having any intent to rob or kill Ponce and insisted he thought they were going to drink alcohol, either at the car wash or elsewhere. Defendant testified that he was "a little bit kind of drunk" but "was walking straight" as they walked to the car wash.

Defendant testified that Ponce waved them in to the interior of the car wash, and they sat down. Defendant asked Ponce if he had any beer. Ponce said he did not, placed his hand on defendant's chest, and began sliding his hand toward Ponce's groin. Defendant was shocked, offended, angry, and frightened. He felt violated. He pushed Ponce away and asked, "What are you doing, you damn fag?" Ponce told defendant not to worry about it and touched defendant again. Defendant became more fearful and offended. He repeatedly called Ponce a "fucking fag," then drew his gun and began shooting at Ponce. Defendant testified he shot without thinking. He remembered firing the first shot and running but did not remember everything in detail. When Ponce fell, defendant panicked and ran away. The next thing defendant remembered was being stopped by the police.

Defendant denied that he ever asked for Ponce's keys, wanted to take Ponce's truck, wanted to kill Ponce, or thought about killing him. He also denied he was a member of a tagging crew.

Detective Michael Johnson interviewed defendant about 5:00 a.m. on January 3. Johnson smelled alcohol on defendant's breath and believed defendant was under the influence of alcohol at the time of the interview. Defendant's speech was not slurred, he walked from the holding cell to the interview room without stumbling or swaying, and his eyes were watery but not red. Defendant was able to communicate with Johnson, sometimes replying evasively and other times responsively. Defendant told Johnson he was a member of a tagging crew. Johnson asked defendant what he planned to do with Ponce's truck, and defendant replied that he would drive it out of the area. Defendant also told Johnson that Ponce touched him inappropriately after he asked for some beer. Defendant said he panicked, drew his gun, and shot Ponce.

The jury acquitted defendant of attempted carjacking but convicted him of attempted murder. The jury found that the attempted murder was willful, deliberate, and premeditated; that in the commission of the offense, defendant personally inflicted great bodily injury upon Ponce (Pen. Code, § 12022.7, subd. (a); all further statutory references pertain to the Penal Code unless otherwise specified); and that defendant personally and intentionally discharged a firearm during the commission of the offense, causing great bodily injury (§ 12022.53, subd. (d)). The court sentenced defendant to life in prison, plus 25 years to life.

DISCUSSION

1. Stipulation that Ponce suffered great bodily injury

At the conclusion of the prosecution's case-in-chief, the parties stipulated on the record that "Pablo Ponce, a witness in the present matter, suffered great bodily injury within the meaning of Penal Code section 1202.77 [*sic*] on January 2, 2007, as a result of being shot four times. Great bodily injury means greater than minor or moderate harm." The court then told the jury that a stipulation meant that the prosecution and defense

"both accept those facts because there is no dispute about the facts. You must accept those as true." On the next trial day, a written form of the stipulation was admitted as a prosecution exhibit. It stated, "Both counsel for the People and Ted Batsakis, counsel for defendant hereby stipulate that: [¶] Pablo Ponce, a witness in the present matter suffered great bodily injury within the meaning of Penal Code section 12022.7 on January 2, 2007, as a result of being shot four times. Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm."

Defendant argues that the stipulation was equivalent to an admission of the section 12022.7 and section 12022.53 enhancement allegations and "provided facts that circumstantially furthered" the prosecution's proof that defendant acted with the specific intent to kill, premeditation, and deliberation. He contends that his conviction and the findings on the enhancement allegations must be reversed because the trial court's acceptance of this stipulation and its instruction to the jury regarding the stipulation violated defendant's statutory and constitutional rights in three ways.

a. Advisement and waiver of constitutional rights

Defendant contends the stipulation was invalid absent an advisement and his personal waiver of his constitutional rights to a jury trial and confrontation, and his privilege against self-incrimination.

Before a court may accept a defendant's guilty plea, it (or the prosecutor) must inform the defendant of his privilege against self-incrimination and his rights to a jury trial and to confront his accusers. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242–244 [89 S.Ct. 1709]; *People v. Howard* (1992) 1 Cal.4th 1132, 1179; *In re Tahl* (1969) 1 Cal.3d 122, 132–133.) After the defendant is informed of his rights, he must expressly and specifically waive them on the record. (*Howard, supra,* 1 Cal.4th at p. 1179.) The same requirements apply to a defendant's admission of an enhancement allegation. (*In re Yurko* (1974) 10 Cal.3d 857, 861–863.) But an advisement and waiver of rights is not required for a stipulation to "one or more, but not all, of the evidentiary facts necessary to

a conviction of an offense or imposition of additional punishment on finding that an enhancement allegation is true . . . ." (*People v. Adams* (1993) 6 Cal.4th 570, 581.)

The stipulation in this case admitted two facts: Ponce suffered great bodily injury as defined in section 12022.7, and this injury resulted from "being shot four times." In order to find the section 12022.7 enhancement allegation true, the jury was told that it had to find the prosecution had proved beyond a reasonable doubt "that the defendant personally inflicted great bodily injury on Pablo Ponce during the commission" of attempted murder, attempted voluntary manslaughter, or attempted carjacking. (CALCRIM No. 3160.) The stipulation therefore relieved the prosecution of the need to prove, and the jury of the need to find, just one of the evidentiary facts necessary to find the section 12022.7 enhancement allegation true: Ponce suffered great bodily injury. In order to find the allegation true, the jury was still required to find, based upon proof beyond a reasonable doubt, that defendant personally inflicted the great bodily injury and that he did so during the attempt to commit murder, voluntary manslaughter, or carjacking.

The stipulation in this case is distinguishable from that in *People v. Little* (2004) 115 Cal.App.4th 766, upon which defendant relies. In *Little*, the defendant was charged with several offenses, including a violation of Health & Safety Code section 11550. The stipulation in issue stated that at the time of the defendant's arrest, he "'was under the influence of a controlled substance, methamphetamine, in violation of Health & Safety Code section 11550(A).'" (*Little*, at p. 772.) The court found that an advisement and a waiver were required because the stipulation "implicitly and necessarily covered all evidentiary facts required for a conviction and imposition of punishment." (*Id.* at p. 778.) The same cannot be said of the stipulation in the present case, which neither expressly conceded a violation of section 12022.7 nor conceded every evidentiary fact necessary for a true finding on the enhancement allegation.

In order to find the section 12022.53, subdivision (d)[1] enhancement allegation true, the jury was told that it had to find the prosecution had proved the following elements beyond a reasonable doubt: (1) "The defendant personally discharged a firearm during the commission" of attempted murder, attempted voluntary manslaughter, or attempted carjacking; (2) "The defendant intended to discharge the firearm"; and (3) "the defendant's act caused great bodily injury to a person who was not an accomplice to the crime." (CALCRIM No. 3150.) In addition, the jury was told to make a determination regarding the enhancement allegation only if it had found defendant guilty of one or both of the underlying offenses. (*Ibid.*) The stipulation relieved the prosecution of the need to prove, and the jury of the need to find, portions of just one of these elements, namely, that Ponce suffered great bodily injury as a result of being shot four times. In order to find the allegation true, the jury was first required to find that defendant committed one of the underlying offenses. It was then required to find that (1) defendant personally discharged a firearm; (2) he did so during the attempt to commit murder, voluntary manslaughter, or carjacking; and (3) he intended to discharge the firearm. The stipulation therefore did not concede all of the evidentiary facts necessary for a true finding on the section 12022.53, subdivision (d) enhancement allegation.

In his reply brief, defendant claims that the prosecutor argued "that the stipulation proved true the 12022.53(d) penalty enhancement . . . ." This mischaracterizes the prosecutor's argument. In the portion cited by defendant, the prosecutor argued, "12022.53 subsection (d), personal discharge of firearm causing great bodily injury. He admitted to that. There is no contention. He admitted he discharged the firearm. Defendant intended to discharge the firearm. He admitted to that, too. [¶] Defendant's

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[1] We address only the enhancement allegation under subdivision (d) of section 12022.53 — disregarding the jury's findings that the allegations under subdivisions (b) and (c) of section 12022.53 were true — because the trial court imposed only the subdivision (d) enhancement, as required by the provisions of section 12022.53,

act caused great bodily injury to a person. We have a stipulation where he agrees to great bodily injury." Defendant apparently misinterprets the prosecutor's references to defendant's admissions as references to the stipulation, rather than defendant's admissions in his testimony and statement to the police. Defendant's interpretation is incorrect and unwarranted. The prosecutor argued that the stipulation established only that Ponce suffered great bodily injury. The prosecutor cited other evidence introduced at trial to support other elements of the enhancement allegation.

The stipulation also did not relieve the prosecution of the need to prove, and the jury of the need to find, that defendant acted with premeditation, deliberation, and the specific intent to kill. The stipulation neither expressly nor implicitly addressed defendant's mental state. It in no way preordained the jury's conclusion regarding whether defendant specifically intended to kill or acted with premeditation or deliberation. This is especially true in light of the intoxication defense defendant presented. In his reply brief, defendant cites the prosecutor's argument to the effect that defendant's conduct in firing four shots at Ponce demonstrated premeditation. But the stipulated facts included neither premeditation nor defendant's firing the shots. That both the stipulation and the argument referred to four shots did not expand the scope of the stipulation to encompass the allegation that the attempted murder was willful, deliberate, and premeditated.

Accordingly, the stipulation did not trigger the advisement and waiver requirement.

b. Statutory requirements

Defendant further argues that the court's acceptance of the stipulation and instruction to the jury violated his statutory rights under section 1170.1, subdivision (e) and section 12022.53, subdivision (j).

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subdivision (f). Nonetheless, analysis comparable to that set forth in this part would apply to the section 12022.53, subdivisions (b) and (c) enhancements.

Section 1170.1, subdivision (e) provides, "All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." Similarly, section 12022.53, subdivision (j) provides in pertinent part that "the existence of any fact required under subdivision . . . (d) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." The stipulation in this case did not violate either of these statutory provisions. The trier of fact, here the jury, found each of the enhancements to be true after being instructed as to all of the elements of each enhancement allegation.

Without citation of authority, defendant argues that "[t]he plain language of these statutes does not authorize an admission by counsel to supply proof of any fact." Defendant is wrong. The statutes require either an admission by the defendant *or* a finding by the trier of fact. Neither statute purports to regulate the form of proof relied upon by the trier of fact in reaching its decision regarding the truth of the enhancement allegation. The jury here was instructed regarding the elements required to find each enhancement true, and we presume it followed those instructions in reaching its findings that the section 12022.7 and section 12022.53, subdivision (d) enhancements were true. The stipulation violated neither section 1170.1, subdivision (e) nor section 12022.53, subdivision (j).

c. Right to a jury trial

Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348] (*Apprendi*) and its progeny, defendant argues that the trial court's acceptance of the stipulation and its instruction to the jury violated his right to a jury trial. He argues that the trial court "effectively found, by crediting the stipulation, facts that led to increased punishment for [defendant]."

Apprendi essentially requires any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum to be charged, submitted to a jury, and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 490.)

Defendant's *Apprendi* claims are unfounded for several reasons. First, the trial court's acceptance of the stipulation and its jury instruction did not increase defendant's sentence. As previously noted, the jury had to find additional facts to find each of the enhancement allegations true. Second, defendant's right to a jury trial was preserved and enforced because the jury, not the court, made the findings on the enhancement allegations. Third, the *Apprendi* line of authority does not preclude stipulations, but only a trial court's increase in the sentence on the basis of its own factual findings. In *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856], which defendant claims is analogous, the United States Supreme Court held that California's Determinate Sentencing Law violated *Apprendi* to the extent it permitted a trial court to choose the high term of a triad based upon aggravating factors found by the court, rather than by a jury beyond a reasonable doubt. *Cunningham* is completely inapposite to defendant's case, in which the jury made the factual findings leading to imposition of the sentence enhancements. The existence of a stipulation establishing one or two of the facts supporting the enhancement allegations did not transfer the decision on the truth of the allegations from the jury to the judge.

For all of these reasons, defendant's *Apprendi* claim has no merit.

2. Instructional error claims

Defendant raises numerous claims of instructional error. We address each claim in turn.

a. Ambiguous, inconsistent, contradictory intoxication instructions

Defendant requested that the trial court instruct with CALCRIM No. 625, pertaining to voluntary intoxication. The trial court noted that the requested instruction was "specific to homicide crimes, so that would cover the attempted murder, attempted voluntary manslaughter. Are you asking for voluntary intoxication as a defense to the attempted carjacking?" Defense counsel said he was, and the court agreed to instruct with CALCRIM No. 3426 as well. Defense counsel did not oppose giving both instructions, ask that either instruction be modified, or ask the court to combine the two

instructions into a single instruction addressing the effect of intoxication upon specific intent, premeditation, and deliberation.

The court then instructed the jury upon attempted murder, the premeditation and deliberation allegation, attempted voluntary manslaughter based upon a heat of passion theory, and the effect of voluntary intoxication on a homicide-type crime, using the following version of CALCRIM No. 625:

"You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

Defendant contends that these instructions were confusing, ambiguous, and contradictory because (1) each told the jury it could not consider the evidence of intoxication for any other purpose, (2) they were separate instructions, (3) CALCRIM No. 625 did not immediately follow the instruction on attempted murder, and (4) CALCRIM No. 625 did not "relate the purpose of voluntary intoxication evidence to either the specific intent required for conviction of attempted murder with premeditation and deliberation, nor [*sic*] the People's burden of proving specific intent." He argues that giving these instructions violated his rights to due process and a jury trial.

Defendant's first, second, and fourth claims essentially argue that the trial court should have modified these instructions or combined them into a single instruction. Defendant requested CALCRIM No. 625. He agreed that he also wanted a voluntary intoxication instruction pertaining to attempted carjacking and did not oppose the court's suggestion that it would use CALCRIM No. 3426 for that purpose. Defendant never requested that the instructions be combined into one or that either one should be modified. He therefore may not contend on appeal that the trial court's failure to sua

sponte modify the instructions was error. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140.)

Defendant similarly failed to raise his constitutional claims in the trial court, and thereby forfeited them. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880–881.)

In any event, none of defendant's claims has merit.

Purportedly erroneous instructions are reviewed in the context of the entire charge to determine whether it is reasonably likely the jury misconstrued or misapplied the challenged instruction. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016–1017.) Defendant's jury was instructed that it must "[p]ay careful attention to all of these instructions and consider them together." (CALCRIM No. 200.) We presume that jurors are intelligent and capable of understanding and correlating all jury instructions given (*People v. Kegler* (1987) 197 Cal.App.3d 72, 80), and that they follow those instructions (*People v. Horton* (1995) 11 Cal.4th 1068, 1121).

CALCRIM No. 625 told the jury it could consider the voluntary intoxication evidence in determining whether defendant acted with the intent to kill, premeditation, or deliberation. CALCRIM No. 3426 told the jury it could consider the voluntary intoxication evidence in determining whether defendant acted with the specific intent required for attempted carjacking. Although the court ideally would have modified in each of these instructions the sentence about not considering the voluntary intoxication evidence for any other purpose, it is not reasonably likely that the jury would have concluded from considering the two instructions together that it could not consider the intoxication evidence with respect to the attempted murder charge, as defendant contends. Any reasonable juror would have understood the final sentence of each instruction as meaning that the jury could not consider the voluntary intoxication evidence for any purpose other than those expressly authorized by each of the two instructions.

Defendant also argues the verdicts demonstrated the jury applied CALCRIM No. 3426, but not CALCRIM No. 625. The difference in the verdicts does not show that the jury found CALCRIM No. 3426 applicable. The attempted carjacking was not supported

by photographic evidence, proof of Ponce's injuries, or defendant's admission. It was instead based solely upon Ponce's testimony, which defendant contradicted. The jury may have believed defendant's testimony that he did not demand the keys to Ponce's truck. Defendant's failure to search for or take the keys from Ponce after the shooting lent some support to defendant's denial of any intent or attempt to take the truck. Defendant's mobile phone records provided some support for defendant's testimony that Ponce arranged to meet with defendant on the night of January 2 and thereby cast a measure of doubt upon the credibility of Ponce's testimony to the extent it was uncorroborated. Alternatively, the jury may have viewed a demand for the keys as insufficient to constitute attempted carjacking, or the jury may have exercised leniency. In any event, the acquittal of attempted carjacking has no tendency to show that the jury applied CALCRIM No. 3426 but not CALCRIM No. 625.

Nor did the court err by using two instructions, rather than a unified instruction covering all permissible uses of the voluntary intoxication evidence. "A trial court is not obliged to condense the required explanation of a legal rule or concept in a single instruction; a charge is not erroneous or prejudicial simply because a required explanation is given in two instructions rather than one." (*People v. Lewis* (2001) 25 Cal.4th 610, 649.)

The order of the instructions did not render them confusing. It has long been held that the order in which instructions are given is generally immaterial. (*People v. Sanders* (1990) 51 Cal.3d 471, 519.) This is especially true when, as here, the jury received printed copies of the instructions and was told to consider all of the instructions together. The court grouped the instructions in a logical order, and nothing about that order created ambiguity or confusion. CALCRIM No. 625 followed the three instructions pertinent to the attempted murder charge and its lesser included offense of attempted voluntary manslaughter. It thus followed instructions on the elements of the offense, just as CALCRIM No. 3426 followed the instruction setting forth the elements of attempted carjacking.

Finally, by telling the jury that it could consider the voluntary intoxication evidence "in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation," CALCRIM No. 625 adequately informed the jury of the relevance of the voluntary intoxication evidence to the mental states pertinent to the attempted murder charge. Although CALCRIM No. 625 did not include language, such as that in CALCRIM No. 3426, referring to the prosecution's burden of proof, the absence of such language did not render the instruction deficient or create any ambiguity or confusion. The jury was repeatedly instructed that the prosecution was required to prove defendant's guilt beyond a reasonable doubt and that any reference in the instructions to something that "the People must prove" meant "they must prove it beyond a reasonable doubt." (CALCRIM Nos. 103, 220.) CALCRIM No. 600 informed the jury that "the People must prove that" "the defendant intended to kill that person" in order to convict defendant of attempted murder. The court further instructed the jury that if it found defendant guilty of attempted murder, it "must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation." (CALCRIM No. 601.) Collectively, these instructions clearly informed the jury that the prosecution was required to prove defendant's specific intent to kill, premeditation, and deliberation beyond a reasonable doubt.

For all of these reasons, the voluntary intoxication instructions were not ambiguous, contradictory, confusing, or misleading. They did not violate defendant's right to a jury trial or due process.

b. Failure to instruct sua sponte on unconsciousness defense

Defendant contends the trial court erred by failing to instruct, sua sponte, on the defense of unconsciousness due to voluntary intoxication.

Unconsciousness caused by voluntary intoxication is not a complete defense to a criminal charge but may be found to negate specific intent under section 22. (*People v. Ochoa* (1998) 19 Cal.4th 353, 423; *People v. Walker* (1993) 14 Cal.App.4th 1615, 1621.)

The trial court has a duty to instruct sua sponte regarding a defense if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Maury* (2003) 30 Cal.4th 342, 424.)

Defendant did not testify that he was unconscious or that he had no memory of the events at the car wash. In fact, defendant's detailed testimony regarding the events leading up to the shooting, along with his selective testimony regarding the shooting itself and his flight afterward, tended to negate any inference of unconsciousness. He testified, for example, quite specifically regarding Ponce's and his own statements and conduct prior to the shooting. He testified that his companion, Mondo, "freaked out" when defendant drew his gun. Defendant remembered aiming, firing the first shot, and running after Ponce. He testified as to the location where Ponce fell and testified that after Ponce fell, he panicked and ran away. He testified that as he was running away, he was scared and did not know what to do or think. The prosecutor asked defendant if his memory of "[t]hat whole time" between the first shot and his capture by the police was "blank." Defendant responded, "[M]y mind was racing. All I remember was just running, being scared. I didn't know what was going on." Finally, defendant testified that at the time the police stopped him, he believed they were doing so "because I shot the guy." Defendant introduced no expert testimony regarding unconsciousness, and defense counsel argued only intoxication, not unconsciousness.

Defendant's own testimony that he could not remember particular details regarding the crime, standing alone, was insufficient to warrant an unconsciousness instruction. (*People v. Rogers* (2006) 39 Cal.4th 826, 888.) Because substantial evidence did not support an unconsciousness theory and nothing indicated that defendant was relying on such a theory, the trial court did not err by failing to instruct on unconsciousness.

In addition, the omission of an instruction is harmless beyond a reasonable doubt where the circumstances show that "'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given

instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context . . . .'" (*People v. Wright* (2006) 40 Cal.4th 81, 98, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 721.) Here, the jury's verdict on the attempted murder charge reveals that the jury found that intoxication did not negate the specific intent to kill. An instruction on unconsciousness based upon voluntary intoxication would have presented the jury with another form of the very question it resolved against defendant. Omission of the instruction was harmless.

c. Failure to instruct sua sponte on effect of intoxication upon section 12022.53, subdivisions (b) and (c) allegations

Defendant contends that the trial court was required to instruct that voluntary intoxication could negate the specific intent necessary to prove the firearm-use and firearm-discharge enhancements alleged under section 12022.53, subdivisions (b) and (c).[2]

As a preliminary matter, we note that defendant did not request intoxication instructions with respect to any enhancement allegation. Nor did he ask the court to modify the intoxication instructions given to apply to the enhancement allegations.

Section 12022.53, subdivision (b) provides an enhancement for "any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm . . . ." There is no specific intent element to which voluntary intoxication could be pertinent.

Section 12022.53, subdivision (c) provides an enhancement for "any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm . . . ." The court instructed the jury on the elements of this enhancement using CALCRIM No. 3148, which provided in pertinent part, "If you find

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[2] The court imposed and stayed terms for these enhancements. Defendant does not challenge the adequacy of instructions regarding the section 12022.53, subdivision (d) enhancement imposed by the court. Nonetheless, analysis comparable to that set forth in this part would apply to the section 12022.53, subdivision (d) enhancement, if defendant had challenged it.

the defendant guilty of the crimes charged in Count 1, Attempted Carjacking, or Count 2, Attempted Murder, you must then decide whether, for each crime, the People have proved the additional allegation that the defendant personally and intentionally discharged a firearm during that offense." The instruction further specified that in order to find the allegation true, the jury must find that "[t]he defendant intended to discharge the firearm."

The jury thus reached the section 12022.53, subdivision (b) enhancement allegations only after finding defendant intended to kill Ponce. Although the intent to kill is not identical to the intent to discharge a firearm, there is no possibility the jury would have found that defendant intended to kill Ponce when he shot at him but did not intend to fire the gun. Furthermore, defendant essentially admitted that he fired the gun intentionally by testifying, "I just kind of pulled the gun and began shooting." Any error by the trial court in failing to instruct on the potential effect of involuntary intoxication on the section 12022.53, subdivision (c) enhancement was harmless beyond a reasonable doubt.

d. Failure to instruct sua sponte on provocation

Defendant contends that the trial court was required to instruct, sua sponte, with CALCRIM No. 522 regarding provocation.[3] He argues the failure to give this instruction effectively reduced the prosecution's burden of proof.

CALCRIM No. 522 is a pinpoint instruction, but a trial court has no duty to give a pinpoint instruction sua sponte. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 878

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[3] CALCRIM No. 522 provides as follows: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.] [¶] [Provocation does not apply to a prosecution under a theory of felony murder.]"

[addressing predecessor instruction, CALJIC No. 8.73[4]]; *People v. Mayfield* (1997) 14 Cal.4th 668, 778.)

In addition, the jury was instructed on provocation as a basis for reaching a verdict of attempted voluntary manslaughter (CALCRIM No. 603). The court's instruction on premeditation and deliberation informed the jury that "[a] decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated." (CALCRIM No. 601.) These instructions provided the jury with sufficient guidance regarding how the defense evidence of Ponce's sexual advances potentially related to the elements of the attempted murder charge and the allegation that it was willful, deliberate, and premeditated. The attempted murder verdict and true finding on the allegation that the crime was willful, deliberate, and premeditated indicate that the jury found defendant did not attempt to kill Ponce as a result of significant provocation because the jury determined that defendant did not make a rash or impulsive decision to kill Ponce without careful consideration.

e. Failure to instruct sua sponte on unreasonable self-defense

Defendant contends the trial court erred by failing to instruct, sua sponte, on unreasonable self-defense as a basis for an attempted voluntary manslaughter verdict.

A trial court must instruct, sua sponte, on all theories of a lesser included offense that find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

One who kills or attempts to kill another person because he or she actually, but unreasonably, believed in the need to defend himself or herself from imminent death or great bodily injury is deemed to have acted without malice. (*People v. McCoy* (2001) 25

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[4] CALJIC No. 8.73 provides: "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation."

Cal.4th 1111, 1116.) Under such an "unreasonable self-defense" theory, the crime committed is manslaughter or attempted manslaughter, not murder or attempted murder. (*Ibid.*)

Although defendant testified that he was frightened by Ponce's conduct in touching him, defendant did not testify — and his testimony also did not support an inference — that he believed he needed to defend himself against imminent death or great bodily injury. Ponce's conduct may have been offensive to defendant, but it was not violent. Nothing in the record indicates Ponce was armed or behaved in a manner that threatened imminent death or great bodily injury to defendant. The court was not required to instruct sua sponte on an unreasonable self-defense theory.

f. Cumulative error

Defendant argues that the cumulative effect of the claimed instructional errors requires reversal. He is incorrect. The only arguable error was the harmless failure to instruct on the effect of intoxication on the intent element of the section 12022.53, subdivision (c) enhancement allegation. There is no prejudicial effect to cumulate.

3. Sufficiency of evidence of premeditation and deliberation

Defendant contends that the evidence was insufficient to support the jury's finding on the allegation that the attempted murder was premeditated and deliberate. He argues that the evidence showed he shot Ponce "as a result of provocation and intoxication, not because of a preconceived design."

To resolve this issue, we review the whole record — including the evidence supporting the attempted carjacking charge — in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; *People v. Norwood* (1972) 26 Cal.App.3d 148, 159; *People v. Lopez* (1981) 131 Cal.App.3d 565, 569–572.)

Three types of evidence that typically support a finding of premeditation and deliberation are planning activity, a prior relationship with the victim or conduct from

which a motive could be inferred, and a manner of killing from which a preconceived plan could be inferred. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27.) These categories are not prerequisites but simply guidelines to assist reviewing courts in assessing whether the evidence supports an inference that the killing or attempted killing resulted from preexisting reflection and weighing of considerations rather than an unconsidered or rash impulse. (*People v. Young* (2005) 34 Cal.4th 1149, 1183.)

The record in this case includes ample evidence within all three of the *Anderson* categories. Defendant's visit to the car wash two days prior to the charged crimes, his act of carrying a loaded gun in his jacket pocket, his arrival at the car wash after it was closed and all of the employees except Ponce had gone home, and his conduct in immediately placing the gun against Ponce's head as he demanded the keys to Ponce's truck showed that defendant planned to rob Ponce and was prepared to use lethal force in accomplishing this goal. (See, e.g., *People v. Miranda* (1987) 44 Cal.3d 57, 87 ["the fact that defendant brought his loaded gun into the store and shortly thereafter used it to kill an unarmed victim reasonably suggests that defendant considered the possibility of murder in advance"], disapproved another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) Ponce's testimony regarding the attempted carjacking showed that the motive for the murder attempt stemmed from the carjacking attempt, that is, to overcome or retaliate for Ponce's resistance or eliminate Ponce as a witness. Defendant and his mother testified that defendant did not have income and depended on handouts from his mother and brother. This evidence, in conjunction with defendant's testimony about his alcohol addiction, revealed a motive for the carjacking attempt leading up to the attempted murder. Finally, defendant's conduct in chasing Ponce and firing at him four times, including two shots after Ponce was wounded and lying face down on the ground, at least one of which was apparently aimed at Ponce's head, revealed a methodical manner of attempting to kill Ponce that was fully consistent with a premeditated, deliberate intent to kill. Evidence refuting the attempted carjacking and offering

alternative explanations did not detract from the sufficiency of the evidence to support the jury's finding.

We would reach the same conclusion even if we excluded evidence pertaining only to the attempted carjacking. Defendant's conduct in retrieving his gun and carrying it to the car wash, and the manner in which he chased and repeatedly shot Ponce provided substantial evidence supporting the jury's finding of premeditation and deliberation.

4. Prosecutorial misconduct

Defendant contends that the prosecutor committed misconduct in argument by misrepresenting the evidence and misstating the law.

A prosecutor's misconduct violates due process if it infects a trial with unfairness. (*People v. Harrison* (2005) 35 Cal.4th 208, 242.) Less egregious conduct by a prosecutor may nonetheless constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to attempt to persuade the court or jury. (*Ibid.*)

Absent a showing that an objection or request for admonition would have been futile or the harm could not have been cured, a defendant may not complain of prosecutorial misconduct unless the defendant objected to the alleged misconduct in a timely fashion at trial and requested that the jury be admonished to disregard the impropriety. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

All but one of defendant's misconduct claims are based upon the italicized statements in the following portions of the prosecutor's argument:

"Now, he is going to tell you — he told us I was drunk. I was drunk. What has the judge instructed you on the intoxication instruction? *Intoxication*, the fact someone had a shot, *doesn't give a defense to the actions subsequently*. It's not a defense that you can have a free-for-all, do whatever you want. *It's whether a person can appreciate his actions, if he could not or if he could.* [¶] A person could be intoxicated and appreciate what they are doing, know what . . . they are doing, understand what they are doing. He doesn't appear drunk. *Not a single officer said he appeared drunk.* Not a single one. He was walking fine, he talked fine. He was responsive. His actions were reality based.

Reality based. [¶] He was drunk, shot somebody he couldn't appreciate, why didn't he sit down? No. He ran. Reality-based answers or responses to what was occurring around him. The fact that I had a little bit doesn't mean I'm sorry, I didn't intend to commit the act, I had no intention of robbing somebody. I just wanted some beer. Brought a gun and another individual, ten o'clock at night, with his car parked outside. [¶] He was able to appreciate his actions. He knew what he was doing. It's not a defense to say I was drunk, sorry, I am not guilty. [¶] . . . [¶] *Detective Johnson* came in rebuttal. *Told you he didn't appear to be intoxicated . . . .*"

Defendant argues the prosecutor misrepresented Johnson's testimony that defendant appeared to be under the influence of alcohol at the time of their interview by arguing that no officer said defendant appeared drunk and Johnson said defendant did not appear to be intoxicated. He also argues the prosecutor misstated the law regarding intoxication and its relationship to the elements of specific intent to kill, premeditation, and deliberation. Defendant did not object to any of these arguments in the trial court and has not suggested why an objection or request for admonition would have been futile or the harm could not have been cured. Defendant forfeited his misconduct claims.

Even if defendant had preserved his claims, we would find no merit in them.

If a prosecutorial misconduct claim is based on the prosecutor's arguments to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522; *People v. Benson* (1990) 52 Cal.3d 754, 793.) No misconduct exists if a juror would have taken the statement to state or imply nothing harmful. (*Benson*, at p. 793.) "[W]e 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

As defendant acknowledges, the prosecutor was literally correct when he asserted that no officer testified that defendant "appeared drunk." Johnson testified that he

smelled alcohol on defendant's breath and believed that defendant was under the influence of alcohol at the time of the interview. But Johnson further testified that defendant did not exhibit any obvious signs of intoxication. He did not have red eyes, did not slump or slur his words, was able to walk without stumbling or swaying, and was able to communicate both responsively and evasively. Johnson testified, "[I]t didn't really stand out, his level of intoxication, to me." The prosecutor's representation was literally true, both with respect to Johnson and all of the other testifying police officers.

Even assuming, as defendant argues, the prosecutor's argument "put too fine a line on" Johnson's testimony, it did not render defendant's trial fundamentally unfair and was, at most, an error of state law. Such misconduct would require reversal only if it is reasonably probable that defendant would have obtained a more favorable result absent the misconduct. (*People v. Ochoa* (2001) 26 Cal.4th 398, 442, disapproved on another ground in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

Johnson gave detailed and relatively lengthy testimony regarding his observations of defendant and the basis for his opinion that defendant was under the influence of alcohol. He was the last witness to testify, and the challenged argument was given the very next day. The jury was instructed that it was to decide the facts based only upon the evidence and that "[n]othing that the attorneys say is evidence." (CALCRIM No. 222.) Such an instruction is generally deemed to dispel any potential for prejudice. (*People v. Hughey* (1987) 194 Cal.App.3d 1383, 1396.) Under all of the circumstances, it is not reasonably probable the jury was misled regarding the state of the record by the prosecutor's brief references to defendant not appearing to be drunk or intoxicated.

Nor did the prosecutor misstate the law regarding intoxication. Read in context, the prosecutor's argument accurately told the jury that voluntary intoxication is not a defense that obviates criminal liability. Although the prosecutor's choice of the "appreciate his actions" terminology was unusual and may not have accurately reflected the law, the prosecutor soon followed by arguing that defendant "was not intoxicated to negate his intent." In any event, the trial court properly instructed the jury on the law and

told the jury to use the law as stated in the instructions and to disregard any conflicting statements of the law made by counsel. (CALCRIM No. 200.) Under the circumstances, there is no reasonable probability defendant would have obtained a more favorable verdict absent the prosecutor's "appreciate his actions" statement.

Defendant's final claim of misconduct is based upon the following argument in the prosecutor's closing argument:

"We are faced with premeditation and deliberation and willful actions every moment of our life. We don't think, what am I going to do if I get cut off on the freeway this evening? We think. We react. We deliberate. It occurs in a split second. [¶] Even if you don't believe that he thought what he was doing on his first shot, he could have deliberated between the second shot, between the third shot, between the fourth shot. A person standing above another human being with a gun, he is deliberating."

Defendant argues the prosecutor misstated the law "by arguing that premeditation occurs every time a person gets cut off of [*sic*] a freeway." Defendant did not object to this argument in the trial court and has not suggested why an objection or request for admonition would have been futile or the harm could not have been cured. Defendant forfeited this misconduct claim also.

In any event, the prosecutor argued, in essence, that (1) the deliberative process can occur very quickly and (2) a weighing of consequences prior to making a decision is a commonplace experience with which jurors are familiar. The prosecutor did not attempt to equate a driving decision with a premeditated and deliberate decision to kill. No reasonable juror would have understood the prosecutor's statements as defendant argues. In addition, the trial court properly instructed the jury on the definitions of premeditation and deliberation, and we presume the jury followed the court's instruction, especially in light of the court's specific direction to disregard conflicting legal pronouncements by counsel. Under the circumstances, there was no misconduct.

5. Juror's delivery of cartoons to trial judge

At the start of the first day of deliberations, the court convened a hearing outside the presence of defendant and the jury. The prosecutor was present in the courtroom and defense counsel appeared via speakerphone. The court informed counsel that "[o]n the way in this morning," Juror No. 4 "handed the bailiff an envelope for" the court. The envelope contained 12 "Herman" cartoons "having to do with courtroom proceedings or prisoners" that appeared to have been torn from newspapers. As far as the record shows, Juror No. 4 simply gave the envelope of cartoons to the court without showing any of the cartoons to other jurors. The court described the cartoons as "old and yellowed as though they have been collected for quite a while." Defense counsel stated he was not familiar with "Herman." The court offered to read them to defense counsel over the phone, and counsel suggested the court read "one of them." The court described two of the cartoons: "It's a one-panel cartoon that has, for example, a person in stripes, prison uniform, talking to his lawyer. 'What do you mean it was a typing error? For 200 bucks an hour, you are supposed to catch typing errors.' [¶] Next one shows a lady talking to a prisoner, 'Okay, I will be back to pick you up in 25 years. What time?' [¶] Of that nature."

Defense counsel asked the court why the juror gave the cartoons to the court. The court replied, "I have no idea. I haven't made any inquiry with them. The bailiff gave them to me after the jury had already gone back into the jury room," and "I think he has probably just found, I guess being in a courtroom for the first time, they were just funny cartoons that people that work in the courtroom might enjoy." The prosecutor said he had no problem with the cartoons, and defense counsel agreed: "I have no problem with it, your honor."

About three hours later, after the jury sent a note informing the court it was deadlocked on the attempted carjacking charge, the court again conferred with counsel outside the presence of defendant and the jury. Defense counsel again appeared by speakerphone. Before addressing the note, the court returned to the matter of the cartoons and inquired whether either attorney wanted the court "to make further inquiry with the

juror." Counsel agreed that they were not asking for further inquiry. About 30 minutes later, the court addressed the jury regarding its note. The jury said it wanted to continue deliberating. About 16 minutes later, the jury informed the court it had reached verdicts.

Defendant contends that the court violated his constitutional rights to be present at a critical stage of trial by conducting the hearing in his absence. He also contends that the cartoons suggested Juror No. 4 was biased against the defense, and the trial court's failure to further inquire of the juror violated defendant's federal constitutional right to an impartial jury. We address each contention in turn.

a. Defendant's absence

The Sixth and Fourteenth Amendments of the United States Constitution, article I, section 15 of the California Constitution, and Penal Code sections 977 and 1043 establish a defendant's right to be personally present at his trial. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1052 (*Wallace*).) A defendant does not have a protected right to be present at every proceeding, only those in which his presence bears a reasonable and substantial relation to his opportunity to defend against the charges or his presence would contribute to the fairness of the procedure. (*Ibid.*; *People v. Harris* (2008) 43 Cal.4th 1269, 1306 (*Harris*).)

The consideration of purported juror misconduct has often been held to be the type of proceeding at which the defendant need not be present. (*Harris*, *supra*, 43 Cal.4th at p. 1309, and cases cited therein.) Nothing about the hearing to consider the significance, if any, of the cartoons suggests a reason to deviate from this standard. While it may have been advisable for counsel to have viewed the cartoons personally, as discussed below in the context of defendant's ineffective assistance claim, defendant's personal presence would not have enhanced the fairness of the hearing. Nor was it the type of proceeding that implicated defendant's opportunity to defend against the charges. Defendant could not, for example, have provided pertinent factual information that would have contributed to the reliability or fairness of the proceeding. Apart from arguing that he could have described the cartoons to counsel over the phone, defendant has not suggested how his

personal presence would have contributed to the hearing. Defendant's right to be personally present did not expand to encompass every proceeding because his attorney was out of the building and chose to appear by telephone.

Even if defendant were entitled to be personally present, he has not demonstrated prejudice or that his presence at the hearing would have altered the outcome of his trial. (*Wallace, supra*, 44 Cal.4th at p. 1052.) It is inconceivable that defendant's presence at the hearing would have made any difference in its outcome, let alone have resulted in a more favorable verdict.

b. Juror bias and failure to further inquire

Not every incident involving potential juror misconduct requires or warrants further investigation. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) The decision whether to investigate is entrusted to the trial court's discretion. (*Ibid.*) We review the trial court's decision for abuse of discretion and will not reverse if substantial evidence supports the trial court's conclusion. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1351.)

We have reviewed photocopies of the 12 cartoons delivered to the trial court by Juror No. 4. The most prominent theme, as depicted in four of the cartoons, was preposterous or callous conduct by a woman who appeared to be the spouse of a prison inmate. The remaining cartoons made fun of a defense attorney (two cartoons), a defendant (one cartoon), a judge (one cartoon), trial witnesses (two cartoons), an elderly prison inmate (one cartoon), and a defendant and a jury foreman (one cartoon). Without exception, the cartoons were lighthearted, humorous depictions of absurd circumstances. They were, in short, gallows humor. Neither their nature nor their tone reflected antagonism toward defendants or defense counsel. None of the cartoons related to any issue in defendant's case. At most, as the trial court noted, the delivery of the cartoons gave rise to an inference that the juror found them funny and thought the judge would also; this reflects the juror's sense of humor, not bias against defendant or defense counsel.

Defendant argues in his reply brief that two of the cartoons mocked and denigrated his intoxication defense and suggested that defense counsel fabricated it. Defendant cites cartoons in which (1) a character — apparently a defense attorney — wearing rabbit ears tells an inmate, "These are for you in court. We're going for 'insanity'"; and (2) an elderly inmate displaying a prison number of "001" says to another inmate, "What really bugs me is I can't remember what I did." Given Detective Johnson's testimony in the prosecution's rebuttal case that he could smell alcohol on defendant's breath some seven hours after the commission of the charged offense and concluded defendant was under the influence of alcohol, there is no possibility any juror would conclude defendant fabricated his claim of excessive drinking. Defendant's intoxication claim may have been exaggerated, but it was not comparable to faking insanity by wearing rabbit ears in court. The second cartoon appears to portray an inmate whose memory has faded due to age and lengthy incarceration; it in no way suggests a fabricated defense.

Defendant argues that other cartoons indicated that Juror No. 4 felt that defendant lied and used "phony emotions" in his testimony to manipulate the jury. The cartoons to which defendant seemingly refers depict preposterous circumstances, such as (1) a jury foreman reluctantly changing the verdict to not guilty while being embraced by an apparently supplicating man and (2) a witness indicating he cannot answer the question because he swore to tell the truth. The cartoons are too absurd and divorced from the reality of defendant's trial to draw any conclusions other than that Juror No. 4 found them humorous. Defendant refers, without specific argument, to a cartoon in which a judge states, "I'm not going to send you to prison for attempted robbery. I'm going to give you a second chance." As with all of the cartoons, the situation depicted is preposterous. If it were to be taken seriously, it would reflect adversely upon the judge, not defendant. Furthermore, although attempted robbery is closely related to attempted carjacking, the jury acquitted defendant of attempted carjacking, which tends to negate any inference of juror bias. Finally, defendant argues that the cartoons make "light of the circumstances of

prisoners in general." We disagree. The cartoons depicting prison or jail inmates are, by and large, sympathetic to the inmate's plight.

The trial court did not abuse its discretion by concluding that neither additional inquiry nor dismissal of Juror No. 4 was required. This is especially true in light of counsel's statements that he had "no problem" with the cartoons and did not desire further inquiry.

6. Ineffective assistance of counsel

Defendant contends his trial attorney rendered ineffective assistance by failing to (1) request jury instructions on provocation, unconsciousness, and unreasonable self-defense; (2) object to "conflicting and inconsistent jury instructions on the defense of intoxication"; (3) object to "misrepresentation as to the facts and law in the prosecution's closing argument"; (4) make "a cogent argument explaining the relationship between jury instructions on defenses and the facts of the case"; and (5) adequately investigate the cartoons given to the court by Juror No. 4.

A claim that counsel was ineffective requires a showing, by a preponderance of the evidence, of objectively unreasonable performance by counsel and a reasonable probability that, but for counsel's errors, defendant would have obtained a more favorable result. (*In re Jones* (1996) 13 Cal.4th 552, 561 (*Jones*).)

Defendant must overcome presumptions that counsel was effective and that the challenged action might be considered sound trial strategy. (*Jones*, *supra*, 13 Cal.4th at p. 561.) Counsel is given wide latitude and discretion in the area of tactics and strategy, but the exercise of that discretion must be founded upon reasonable investigation and preparation, and reasonable and informed decisions in light of the facts and options reasonably apparent to counsel at the time of trial. (*Id.* at pp. 561, 564–565.) In order to prevail on an ineffective assistance of counsel claim on appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. (*People v. Majors* (1998) 18 Cal.4th 385, 403.)

a. Failure to request provocation, unconsciousness, and unreasonable self-defense instructions

The jury was instructed on provocation as a basis for reaching a verdict of attempted voluntary manslaughter as a lesser included offense of attempted murder (CALCRIM No. 603). The jury was also instructed that "[a] decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated." (CALCRIM No. 601.) Because these instructions adequately informed the jury how to consider and use any provocation evidence, defendant cannot show he was prejudiced by the absence of additional provocation instructions because the attempted murder verdict indicates that the jury rejected defendant's claim that he attempted to kill Ponce as a result of significant provocation.

Defendant's purported defense of unconsciousness based upon voluntary intoxication was actually no different from his intoxication defense. The identity of these "defenses" constituted a rational tactical purpose for counsel to refrain from seeking an instruction on unconsciousness. Furthermore, given the jury's findings that defendant specifically intended to kill Ponce and that the crime was willful, deliberate, and premeditated, there is no reasonable probability defendant would have obtained a more favorable result if counsel had requested instruction on unconsciousness.

Unreasonable self-defense was not supported by the evidence. Counsel's failure to make a futile request for an instruction on a factually unsupported theory is not ineffective assistance. (*People v. Price* (1991) 1 Cal.4th 324, 387.)

b. Failure to object to intoxication instructions

The intoxication instructions, CALCRIM Nos. 625 and 3426, were not confusing, conflicting, inconsistent, or ambiguous. They adequately informed the jury that it could consider whether defendant was intoxicated and whether his intoxication negated specific intent, premeditation, or deliberation. Although counsel could have asked the court to modify or combine the instructions, there is no reasonable probability that any such modification would have resulted in a verdict more favorable to defendant.

c. Failure to object to prosecutor's argument

Deciding whether to object to allegedly improper argument is inherently tactical, and the failure to object will seldom constitute defective performance. (*People v. Salcido* (2008) 44 Cal.4th 93, 172.) Because the prosecutor did not misrepresent the facts or law in his argument to the jury, defense counsel may have made a tactical decision not to risk antagonizing the jury or casting unwarranted emphasis upon the prosecutor's argument by objecting. In any event, the appellate record does not affirmatively disclose the lack of a rational tactical purpose for counsel's failure to object to the portions of the prosecutor's argument challenged on appeal.

In addition, as explained in the context of defendant's prosecutorial misconduct claim, defendant has not shown a reasonable probability that he would have obtained a more favorable result if his attorney had objected to the prosecutor's argument.

d. Failure to make "a cogent argument"

The content and form of argument are inherently tactical matters. (*People v. Hart* (1999) 20 Cal.4th 546, 631–632; *People v. Thomas* (1992) 2 Cal.4th 489, 531–532.) Defendant's trial attorney adopted a reasonable strategy regarding argument in light of the undisputed evidence that defendant chased and repeatedly shot Ponce, firing two shots after Ponce lay wounded and defenseless on the ground. Counsel focused his argument on matters as to which the jury might be persuaded that the prosecution had not proved its case beyond a reasonable doubt, such as whether defendant acted with the requisite intent and mental states and whether there was any actual attempt to take Ponce's truck or other property. He highlighted evidence that supported defendant's version of events, such as phone records showing that Ponce called defendant, Ponce's reluctance to tell the police about his conversation with defendant or his companion, and inconsistencies in Ponce's account. He also repeatedly referred to defendant's drinking and argued that "intoxication play[ed] a role regarding the elements . . . the People have to prove" for each crime.

Counsel was not required to "explain[] the relationship between jury instructions on defenses and the facts of the case." The relationship between the facts and the jury instructions was self-evident, and the instructions explained the relationship between the defense theories and the elements of the offenses and enhancement allegations. Counsel may have made a reasonable tactical decision to focus his argument and the jury's attention on the defense theories of the case and the evidence he felt supported those theories and cast doubt upon the sufficiency of the prosecution's proof, rather than explaining the obvious. Counsel's argument fell within the wide range of reasonable professional assistance, and the appellate record does not affirmatively disclose the lack of a rational tactical purpose for counsel's failure to address the jury instructions in his argument. In addition, defendant has not shown that he was prejudiced by counsel's failure to discuss the jury instructions in argument.

e. Failure to adequately investigate cartoons

Defense counsel decided, without seeing the cartoons or even hearing a description of each one, that no bias or misconduct could be inferred from Juror No. 4's delivery of the cartoons to the judge. Counsel's decision might be viewed as one that was not informed or founded upon a reasonable investigation. But our review of the cartoons provides no basis for a conclusion that counsel would have found any of the cartoons objectionable or succeeded in persuading the court that the cartoons indicated that Juror No. 4 was biased against defendant. In addition, the jury's acquittal of defendant on the attempted carjacking charge strongly suggests that no juror was biased against defendant.

For all of these reasons, defendant's ineffective assistance claims have no merit.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.